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Supreme Court, U.S.
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No. 98-761

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM C. MARTIN,

Petitioner,

vs.

VICTOR BAUGH, individually and in his official capacity,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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INTRODUCTION

Martin submits this supplemental brief pursuant to Supreme Court Rule 15.8, to bring to the Court's attention two new decisions applying the law of qualified immunity in the context of retaliation against public employees. In particular, Martin submits *Robinson v. Balog*, 160 F.3d 183 (4th Cir. 1998) (decided Nov. 12, 1998), demonstrating that the Fourth Circuit, in addition to the Tenth Circuit, applies qualified immunity correctly, and in contrast to the incorrect version of qualified immunity applied by the Eleventh Circuit. In addition, Martin submits *Paradis v. Montrose Mem. Hosp.*, 157 F.3d 815 (10th Cir. 1998) (decided October 14, 1998), showing the Tenth Circuit's correct application of qualified immunity law, and especially the use of precedent.

REASONS FOR GRANTING THE WRIT

RECENT DECISIONS DEMONSTRATE THE ERROR OF THE ELEVENTH CIRCUIT'S STATEMENT OF THE LAW OF QUALIFIED IMMUNITY IN THE CONTEXT OF PUBLIC EMPLOYEES, AND THE CONTINUING CONFLICT AMONG THE CIRCUITS.

Two recent decisions shed more light on the issues raised by Martin in his petition to this Court. In *Robinson v. Balog*, 160 F.3d 183 (4th Cir. 1998) (decided Nov. 12, 1998), plaintiffs were employed by the city of Baltimore in the department of public works. Defendants were their superiors in that department. Plaintiffs alleged that a bid for a contract with the city was rigged to reward a political contributor, by tailoring the contract specifications to the contributor's bid. This allegation is very similar to the bid scandal from which Martin's case arises, where the City of Birmingham tailored its request for bids to create a sole supplier situation to favor Motorola. The *Robinson* plaintiffs made statements to their superior, and also spoke at a public hearing and to federal officers. They alleged that they were retaliated

against in their employment by the defendants, and showed the changes in the conditions of their employment. 160 F.3d at 189, footnote 2.

On defendants' motions for summary judgment, the district court held that the individual defendants were entitled to qualified immunity. The district court held, in particular, that "even if [plaintiffs] did engage in speech as citizens on a matter of public concern, defendants could reasonably have believed that they had a legitimate interest in insisting upon obedience to their workplace decisions." 160 F.3d at 187. The district court so held despite the Fourth Circuit's observation that "defendants have failed to present any evidence" that the plaintiffs' speech interfered with the functioning of their agency. 160 F.3d at 189. This portion of the district court's holding in *Robinson* is the functional equivalent of the Eleventh Circuit's holding in Martin that put the burden on Martin to address *Pickering* balancing, as discussed below.

The Fourth Circuit reversed as to the grant of qualified immunity to the individual defendants. Martin submits this decision because the Fourth Circuit correctly applied the decisions of this Court in a case very similar to Martin's, focusing upon *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Connick v. Meyers*, 461 U.S. 138 (1983).

The Fourth Circuit wrote that

> the threshold question was whether an employee's speech "may be 'fairly characterized as constituting speech on a matter of public concern.' "

Robinson, 160 F.3d at 187 (relying upon *Connick*, 461 U.S. at 146). The Fourth Circuit's analysis of "public concern" was limited to whether it met certain requirements of content, form and context, once again relying upon *Connick*, 461 U.S. at 147-48. As the Fourth Circuit wrote,

> In view of the content, form and context of Robinson and Marc's speech, we therefore hold that it should have been evident to any reasonable government official that the speech addressed a matter of public concern.

160 F.3d at 189.

Martin emphasizes that the Fourth Circuit did not apply *Pickering* balancing to the analysis of whether the speech was of public concern, or whether the plaintiffs had shown their clearly established right, in contrast to the Eleventh Circuit's analysis in *Martin*. That balancing test is part of the defendant's case, as discussed immediately below.

The Fourth Circuit then addressed the district court's holding with regard to "obedience to workplace decisions." This portion of the district court's holding shows its erroneous shifting of the burden of *Pickering* balancing to the plaintiffs, just as the Eleventh Circuit did in *Martin*.

The Fourth Circuit concluded that the district court was indeed applying such balancing, writing that: "Presumably, the district court based this conclusion on its belief that the defendants' interest in the efficient operation of the DPW outweighed plaintiffs' interest in First Amendment expression." 160 F.3d at 189 (citing *Pickering*, 391 U.S. 563, 568). The Fourth Circuit found that the defendants had not shown any evidence relevant to such balancing, and thus the district court had erred in granting qualified immunity. The Fourth Circuit held that,

> In view of the lack of evidence supporting the City's interest in disciplining Robinson and Marc for their speech, we hold that the district court erred in precipitously resolving the *Pickering* balance in favor of the defendants.

160 F.3d at 189.

By resolving the *Pickering* balance in favor of the defendants, despite the fact that those defendants had not presented any evidence relevant to that balancing, the district court had effectively done what the Eleventh Circuit did in Martin's case, reaching the same result. The Fourth Circuit correctly applied qualified immunity law to reverse this error by the district court. Clearly, the Fourth Circuit and Eleventh Circuit are in conflict.

The Fourth Circuit made one further comment that Martin would emphasize to this Court.

> This is, however, no ordinary workplace dispute. It is, in fact, a clearer assertion of a constitutional violation than that encountered in any of our precedents. Robinson and Marc allege corruption in the use of public funds and the serious public health hazards to which that misuse of funds might ultimately lead. . . . To approve retaliation against public employees under these circumstances would place wrongdoing in government beyond the point of correction and forsake the curative role of speech in our constitutional regime.

160 F.3d at 190. This is precisely the argument made by Martin. As a public employee, he was well placed to expose, and to help investigate, the misuse of public funds. He did help his city councilman to expose the misuse. How could it be *lawful* for his supervisor, Baugh, to persecute him for this speech?

Similarly, in *Paradis v. Montrose Mem. Hosp.*, 157 F.3d 815 (10th Cir. 1998) (decided October 14, 1998), the Tenth Circuit correctly applied the law. First of all, the court correctly relied upon Connick for the content, form and context test for public concern. The Tenth Circuit did not impose balancing on the plaintiff. 157 F.3d at 818.

Second, the Tenth Circuit correctly applied precedent. That court held that two factually similar, prior cases put the defendants on notice. That court did *not* require the plaintiff to find precedent that was similar in "all *Pickering-Connick*" aspects before that precedent was sufficient to put the defendant on notice, contrary to the Eleventh Circuit's holding in *Martin*. Instead, the Tenth Circuit is applying precedent in the manner mandated by this Court in *United States v. Lanier*, 117 S. Ct. 1219 (1997), as discussed by Martin in the petition to this Court.

CONCLUSION

Public employees are guardians of the public treasury and of the public health. This Court has in the past taken care to balance the right of public employees to speak on matters of public interest with the need for public agencies to run their affairs. This Court has also recognized the public need for guardians, and has taken care to protect public employees from illegal retaliation for their speech. Just as the circuit court stated in *Robinson*, above, we can not tolerate wrongdoing in government, and should give public employees scope to expose and correct such wrongdoing. This Court should grant the petition in favor of Mr. Martin to correct a serious error in the interpretation of law in the Eleventh Circuit.

Respectfully submitted,

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